Supreme Court of Ohio.

JESSE S. NORTON *v.* CHESTER BLINN.

While courts will not enforce an illegal contract between the parties, yet, if an agent of one of the parties has, in the prosecution of the illegal enterprise for his principal, received money or other property belonging to his principal, he is bound to turn it over to him, and cannot shield himself from liability therefor upon the ground of the illegality of the original transaction.

ERROR to the District Court of Lucas County.

About the 1st of May 1872, Chester Blinn placed in the hands of Jesse S. Norton, at Toledo, Ohio, the sum of $500, to be by him invested as agent for Blinn in options on wheat at Milwaukee, Wisconsin, or Chicago, Illinois, with instructions to invest the money as he would his own. Norton, through his brokers, James Keller & Co., immediately purchased in his own name, but for the sole benefit of Blinn, 5000 bushels of wheat, at seller's option for June delivery, at $1.42½ per bushel, and deposited the money of Blinn as a margin of ten cents per bushel. At the date for delivery the price of wheat had advanced so that a profit of $325 was realized on the transaction. This money, principal and profit, was reinvested by Norton in subsequent transactions of like nature for Blinn's benefit, but by reason of a decline in the market price of wheat, in the latter part of June, the whole amount was lost.

These transactions were mere speculations or ventures on the future price of wheat, without any intention that the wheat would be either paid for or delivered, but with intention that settlement between the buyer and seller would be made on the difference between the price stated in the contract and the market price at the date named for delivery. Such transactions were unlawful in the states of Illinois and Wisconsin, as well as in the state of Ohio.

The original suit was brought in the Court of Common Pleas of Lucas county, by Blinn against Norton, to recover the sum of $825 (the sum advanced and the profit on the first venture), with interest.

On the trial testimony was offered by the plaintiff tending to prove that defendant had no authority to invest plaintiff's money, save in a single purchase, namely, the purchase of 5000 bushels as

above stated, whereupon the plaintiff requested the court to instruct the jury as follows:

"If the jury shall find from the testimony that on or about the time stated in the petition, the defendant received from the plaintiff the sum of $500 of the money of the latter, under an arrangement that the same should be invested by the defendant in wheat transactions, of the illegal character mentioned in the answer, for the benefit of the plaintiff; that said money was so invested by the defendant, and a profit realized thereon; and that before the commencement of this action said sum of $500, and the profits so made, came into and are still in the hands of the defendant, or that he received credit therefor in the final settlement of his accounts with the brokers, through whom said business was transacted, then the plaintiff is entitled to recover said money from the defendant; nor, in such case, can the defendant avoid his liability to account for said moneys by showing that by the understanding between the plaintiff and himself said money was to be employed in illegal transactions in wheat, of the nature stated in his answer; and that said money was employed, and said profits realized in such transactions."

Which charge the court refused to give, and to such refusal the plaintiff, by his counsel, then and there excepted.

The verdict of the jury was in favor of the defendant, and judgment was rendered accordingly. This judgment, on petition in error, was reversed by the District Court and this proceeding is to reverse the judgment of the District Court.

Haynes & Potter, for plaintiff in error.

C. H. Scribner and *J. M. Ritchie*, for defendant in error.

McIlvain, J.—While it has ever been the policy of the law to leave the parties to an illegal transaction where it finds them, by refusing relief to either in respect thereto, it has, on the other hand, never regarded property or money employed therein or produced thereby as common plunder to be seized or retained by others in no way interested in such business.

The question, however, in this case, arising on the refusal of the Court of Common Pleas to charge the jury as requested by the plaintiff, is this: May an agent who has transacted illegal business

for his principal, and has received money belonging to his principal and accruing from such business, defend himself, in a court of law, against liability to account therefor, by showing such unlawful business and his connection therewith as such agent?

If the agent receiving such money had not been employed in conducting such business, it would seem to be quite upon principles of purest morality that he should account to his principal therefor; but when the sole employment of the agent was to manage and conduct the unlawful transactions, it seems to me, a much more difficult question arises. In the latter case the agent is *particeps criminis*. In offences against trade, and the like, the law regulating the administration of penal justice does not recognise the relation of principal and agent, unless the agent be an innocent instrument merely. In such cases the guilty offenders against the law are all principals; hence, as between such, with some show of reason it might be said that the law will afford no redress by civil remedies.

The rulings upon this question, however, have been so uniformly the other way, it becomes our duty to follow them unless we find them totally repugnant to public policy and morality. Upon a careful examination of the authorities, we find no such repugnancy —indeed they commend themselves to our judgment.

In the first place the rule which denies civil remedies in such cases, applies only to the parties to the illegal transaction. Public policy does not require that one engaged in an unlawful enterprise should by pleading it shield himself from liability for the wages of his employees, agents or servants. It is enough that the rule should be enforced as between those who have some interest in the enterprise as principals.

In the second place it is contrary to public policy and good morals to permit employees, agents or servants to seize or retain the property of their principal, although it may be employed in illegal business and under their control. No consideration of public policy can justify a lowering of the standard of moral honesty required of persons in these relations.

And again, if parties to an illegal contract waive the illegality and honestly account as between themselves, no other person can be heard to complain of such accounting. Hence, we think, that if in making such settlement, one of the guilty parties should deliver property or money to an agent of another to be delivered by

the agent to his principal, such agent is bound to account therefor to his principal.

A leading case on this question is *Tenant* v. *Elliott*, 1 Bos. & Pul. 2, where the defendant, a broker, effected an illegal insurance for the plaintiff on a ship, and after a loss the underwriters paid the amount of the insurance to the defendant, who refused to pay the same over to plaintiff, on the ground that the insurance contract was illegal. Judgment for the plaintiff. EYRE, C. J., said: "The defendant is not like a stockholder. The question is whether he who has received money to another's use on an illegal contract, can be allowed to retain it, and that not even at the desire of those who paid it to him? I think he cannot."

In *Brooks* v. *Martin*, 2 Wall. 70, it was held by the Supreme Court of the United States, that "after a partnership contract confessedly against public policy has been carried out, and money contributed by one of the partners was passed into other forms—the result of the contemplated operation completed—a partner in whose hands the profits are, cannot refuse to account for and divide them on the ground of the illegal character of the original contract."

In *Baldwin* v. *Potter*, 46 Vt. 402, it was held that "an agent is bound to account to his principal for money received in the course of his agency for goods sold by his principal on orders obtained by him as such agent on commission, although such sales, as between the principal and purchaser, be illegal and void."

In *Evans* v. *Trenton*, 4 Zabriskie 764, it was held: "The mere agent of a party to an illegal transaction cannot set up the illegality of the transaction in a suit by his principal to recover money that has been paid to such agent for his principal on account of the illegal transaction. This defence can be set up only by a *party* to the illegal action." In this case the illegal transaction was accomplished through the agent. See also Wood on Master and Servant, sect. 202, where it is said:

"While the courts will not enforce an illegal contract, yet if a servant or agent of another has, in the prosecution of an illegal enterprise for his master, received money or other property belonging to the master, he is bound to turn it over to him, and cannot shield himself from liability therefor upon the ground of the illegality of the original transaction."

The doctrine of these authorities, and many others which might

be cited, is recognised, applied and enforced in *German, &c., Congregation* v. *Stegner*, 21 Ohio St. 488, wherein it is held: "While a promissory note given to and discounted by a corporation for a loan of money in the course of an unauthorized banking business will not be enforced, yet where the treasurer of such corporation has taken and appropriated to his private use moneys deposited with it, contrary to the statutes against unauthorized banking, and being unable when called on to refund the same, secures it by his promissory note, such note will not be held to have been given in the course and furtherance of an illegitimate business, and an action will lie thereon."

Judgment of the District Court affirmed.

The commonest form of actions between broker and principal arising out of stock-jobbing or similar transactions are those in which the broker sues his principal to recover for margins he has advanced on behalf of the principal. The general rule certainly is that where two parties are knowingly and wilfully engaged in an illegal transaction, the courts will assist neither party to recover of the other for losses incurred in such transaction on such other's behalf. But the courts appear to have been astute to find facts taking the cases out of this rule. The sympathies of the judges seem to have been in most cases with the person advancing the funds, although both parties were engaged in an illegal transaction. As remarked by GROSE, J., in *Petrie* v. *Hannay*, 3 Term Rep. 424, "On the part of the defendant (who had set up the illegality of the transaction as a defence to an action for advances) there is neither honor or honesty in the defence, and the plaintiffs ought to recover as much as the law can give them without interfering with one of the most politic and beneficial statutes that was ever passed."

In the line of cases of which *Rosewarne* v. *Billing*, 15 C. B. N. S. 321, is an example, the action by a broker against his principal for money advanced by the broker upon his principal's wagering contract, is sustained upon the subtle ground that, notwithstanding such contracts were declared void by statute (8 and 9 Vict. c. 109), they were not, however, illegal. Said ERLE, C. J.: "Now the law as to gaming contracts is that all such contracts are null and void, and no action can be maintained upon them. But they are not therefore illegal. The parties making them are not liable to any action or to any penalties." And see *Knight* v. *Cambers*, 15 C. B. 562; *Jessop* v. *Lutwyche*, 10 Exch. 614; *Knight* v. *Fitch*, 15 C. B. 564.

Another ground upon which a recovery of money advanced in furtherance or execution of a wagering contract has been based, is that a contract to pay the money was made subsequent to the original wagering contract. This was the view taken in *Petrie* v. *Hannay*, 3 T. R. 418, wherein it was decided that if two persons jointly engage in a stock-jobbing transaction and employ a broker to pay the differences, and one of them repay the whole sum to the broker with the privity and consent of the other, he may recover a moiety from that other in an action for money paid to his use. See also *Faikney* v. *Reynous*, 4 Burr. 2069; *Durant* v. *Burt*, 98 Mass. 167; *Owen* v. *Davis*, 1 Bailey 315; *Armstrong* v. *Toler*, 11 Wheat. 274; *Lehman* v. *Strassberger*, 2 Woods 561.

A third ground upon which brokers have recovered advances made by them on behalf of their principals is that although the principal intended merely to gamble, the broker on the other hand acted in good faith and actually purchased the commodity or stocks for his principal. As remarked in *Hibblewhite* v. *McMorine*, 5 M. & W. 462, "it cannot be a wager unless both parties are cognisant of the facts." See, also, *Lehman* v. *Strassberger*, 2 Woods 564; *Ashton* v. *Dakin*, 4 H. & N. 867; *Gregory* v. *Wendell*, 39 Mich. 337.

Where A., through a factor, makes a contract with B. for the purchase or sale of cotton for future delivery, intending that there should be no delivery but that the contract should be performed by the payment of differences, but this purpose is not shown to be also the purpose of B.: *Held*, that a note given by A. to the factor for money advanced by him to pay losses on such contracts, and for his commissions in making the same, was a valid and binding obligation: *Lehman* v. *Strassberger*, 2 Woods 555.

And further to the general proposition that a broker may recover his advances, see *Brown* v. *Speyers*, 20 Grat. 309; *Kingsbury* v. *Kirwan*, 6 Cent. Law Jour. 228. *Wyman* v. *Fiske*, 3 Allen 238; *Durant* v. *Burt*, 98 Mass. 161; *Warren* v. *Hewitt*, 45 Geo. 501; *Winchester* v. *Nutter*, 52 N. H. 507; *Marshall* v. *Thurston*, 3 Lea 740; Note to *Sawyer* v. *Taggart*, 18 Am. Law. Reg. (N. S.) p. 230; *Armstrong* v. *Toler*, 11 Wheat. 258; *Gilbert* v. *Gaugar*, 8 Biss. 214; *Thatcher* v. *Hardy*, L. R., 4 Q. B. 685; s. c. 18 Am. L. R. 254, and note; *Ex parte Pyke*, L. R., 8 Ch. Div. 756; *Reed* v. *Anderson*, L. R., 10 Q. B. 100.

There is, however, no lack of authority holding that a broker cannot recover for advances made for his principal in a stock, or grain gambling transaction. Perhaps the best considered case is *Barnard* v. *Backhaus*, 52 Wis. 603, wherein a note given by a principal to his broker for services rendered and money advanced in settling gambling grain contracts was held void. "They (the brokers) were engaged equally with him (the principal) in the transaction of illegal business; and the fact that they were executing the orders of their principal does not render them any the less blameworthy. All were engaged in the furtherance of illegal objects—making contracts which were unlawful; consequently a note given for money which they paid in the settlement of their contracts is tainted with illegality:" *Barnard* v. *Backhaus*, 52 Wis. 603. See also *Rudolph* v. *Winters*, 7 Neb. 134.

A. being employed as a broker for B. in stock-jobbing transactions paid the differences for him; a dispute arising between them respecting the amount of A.'s demand, the matter was referred to C., who awarded 360*l.* to be due; on which A. drew on B. for 100*l.*, part of the above, and indorsed the bill to C., the arbitrator, after B. had accepted it: *Held*, that C. could not recover on the bill: *Steers* v. *Lashley*, 6 T. R. 61.

Where the whole amount deposited by a minor as margins is lost in stock gambling he is at liberty to recover back at any time, from the brokers employed by him the amount so deposited, and this even if the brokers did not know they were dealing with a minor: GORDON, J., intimated that the doctrine that where an infant has executed a contract and enjoyed the benefit of it, and afterwards on coming of age seeks to avoid it, he must first restore the consideration which he has received—that he cannot have the benefit on one side without restoring the equivalent on the other, may and certainly does apply in some cases, but as a general rule is unsound, and certainly without application in this case: *Ruchizky* v. *DeHaven*, 97 Penn. St. 202.

A. directed B., a stockbroker, to sell on his account 500 shares of stock "short." It did not appear whether A. owned the stock or not. He gave no

certificate to B., and arranged with him that there was to be no actual delivery of the stock between them, but that A. was to protect B. from loss if the market value of the stock advanced, and receive the difference in value from B., if it declined. There was no agreement that B. should not make actual delivery of the stock he was instructed to sell. B. sold accordingly, and afterwards the price rose. B. then borrowed from a fellow broker the necessary certificates to make delivery and did deliver them and receive payment therefor through his clearing-house sheet. The price still rising B. subsequently bought on A.'s order 500 like shares, to make good his loan, receiving them and paying for them also through his clearing-house sheet. He paid also the lender the amount of an intermediate dividend on the stock. In an action by B. against A. to recover the amount expended for A.'s use in these transactions, it was decided that B. could not recover, because the evidence showed that the transactions were mere gambling contracts, and as such contrary to law: *Dickson* v. *Thomas*, 97 Penn. St. 279.

It has been also held that money advanced by a principal to an agent to enable the latter to create a "corner" is not recoverable by the principal: *Sampson* v. *Shaw*, 101 Mass. 150. And see further *In re Green*, 15 Nat. Bank. Reg. 199.

From this brief review of the cases it appears that there is some conflict of authority upon the question whether where broker and principal are both engaged in a gambling transaction the former can recover for advances made on behalf of his principal; or conversely if those transactions result profitably, whether the principal can compel his broker to account for the profits.

There is no doubt whatever that a multitude of the transactions in grain, produce, stocks and securities are mere wagers upon fluctuations in prices. There being no intention to accept or to deliver the commodity or security bought or sold, these "deals" are gambling transactions, and this form of gambling is of the most pernicious and demoralizing kind. It acquires a sort of *quasi* respectability from the fact that in form it is similar to the legitimate sales and deliveries of securities or commodities upon the great exchanges or boards of trade in the larger cities. Being gambling under the cloak of honest trading thousands engage in it who would never for a moment permit themselves to enter a "gambling-hell," and to bet upon the turn of a card. Clerks, school teachers, mechanics, farmers, men and women of every age and station in society are found "speculating" upon "margins," through commission men or brokers upon the exchanges or boards of trade, or personally upon the various "open boards" and "bucket-shops," which within a few years past have been established in the larger cities as an evidence of the recent increase and magnitude of unhealthy speculation and fictitious trading.

It might be well, considering the pernicious and seductive character of this form of gambling, and its great increase within recent years, for courts to give the principle of law which declares wagering contracts in securities or produce to be illegal and void a liberal enforcement, so as to punish those who engage in such unlawful ventures, whether as principals or as agents by refusing to protect them against or to indemnify them for each other's breach of faith.

The example of the Pennsylvania and Wisconsin courts in refusing to countenance these speculative practices is commendable, and if vigorously followed by other tribunals cannot but have a wholesome influence in restraining this species of gambling.

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